



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

JUL 27 2005

Ms. Mimi Drew, Director
Division of Water Resource Management
Florida Department of Environmental Protection
Twin Towers Office Building
Mail Station 3600
2600 Blair Stone Road
Tallahassee, FL

Dear Ms. Drew:

The U.S. Environmental Protection Agency (USEPA) has completed its review of revisions to Rule 62-302.540 F.A.C. (Rule). These revisions were adopted by the State on May 5, 2005, and submitted for USEPA review by letter dated June 3, 2005, from Gregory M. Munsen, General Counsel, Florida Department of Environmental Protection (FDEP), to J. I. Palmer, Jr., Regional Administrator, USEPA Region 4. The letter included a certification that the "enclosed amendments to Rule 62-302.540, Florida Administrative Code, were duly adopted pursuant to State law."

On January 12, 2005, FDEP submitted Rule 62-302.540 F.A.C. to USEPA for review under section 303(c) of the Clean Water Act (CWA). On January 24, 2005, after a review of Rule 62-302.540 F.A.C., USEPA determined that certain portions of the Rule were new or revised state water quality standards and issued a determination approving portions of the Rule. In that Determination, USEPA did not approve subparagraph (4)(c)1. of Rule 62-302.540 F.A.C., which specified that a specific test that utilized a monitoring network of 14 interior marsh stations was to be used for the purpose of measuring compliance with the numeric criterion for phosphorus in the Arthur R. Loxahatchee National Wildlife Refuge (the Refuge). In the January 24, 2005 letter summarizing USEPA's review of Rule 62-302.540 F.A.C., USEPA stated:

The use of the specific network of 14 interior marsh stations for the purpose of determining achievement of the phosphorus criterion does not fully represent water quality conditions throughout all areas of the Refuge. In order to determine the achievement of the phosphorus criterion throughout the water body, other monitoring stations are needed in addition to the 14 existing interior marsh stations. Because this Subparagraph limits application of the water quality criterion by restricting measurement to the 14 interior stations, USEPA is not able to conclude that it is protective of the designated use of the entire Refuge.

Paragraph (4)(c) of the Rule specifies that the four-part test will apply to the Refuge if the Settlement Agreement is no longer in force. USEPA evaluated an independent analysis of data from the Refuge with respect to the four-part test. These simulations indicate that when the long-term geometric mean exceeds 10 ppb there is a high probability that the four-part test will detect failure, with about a 90 percent failure rate at 13 ppb. In addition, as desired, the four-part test consistently identified failures at impacted sites evaluated (the impacted portion of the marsh would not achieve the criterion, as expected). **Therefore, USEPA has concluded that the four-part test is an appropriate and protective methodology for determining achievement of the adopted phosphorus criterion in the Refuge and its application would be expected to protect the designated use.**

Since USEPA is approving Paragraph (4)(a), **the numeric criterion for phosphorus of a long-term geometric mean of 10 ppb for Class III waters in the EPA, which includes the entire Refuge, is now in effect for CWA purposes for the entire water body.** USEPA is *not* approving (4)(c)(1) for the reasons stated above based on 40 CFR 131.11(a) which requires that "states must adopt those water quality criteria that protect the designated use." It is the methodology in (4)(c)(1) that is not in effect for CWA purposes.

As discussed above, (4)(c) of the Rule notes that if the Settlement Agreement is no longer in force, achievement of the criterion in the Park and the Refuge shall be determined based on the method provided for the remainder of the EFA [the four-part test]. USEPA evaluated an independent analysis of the four-part test using existing available data **and concluded that the four-part test applied to the Refuge would meet the requirements of the CWA and 40 CFR Part 131 to protect the designated use of the Refuge.** [emphasis added]

Based on our review of the revisions adopted on May 5, 2005, Rule 62-302.540 F.A.C. has been modified to delete any reference to the use of the 14 interior marsh stations for measurement of compliance with the numeric phosphorus criterion. Thus, the State no longer limits the applicability of its criterion simply to interior portions of the Refuge. The May 5, 2005, revisions address USEPA's concerns raised in the January 24, 2005 Determination because there is no longer any limitation on the applicability of the numeric criterion for phosphorus for protection of the Class III designated use for all waters of the Refuge. Therefore, USEPA is now approving these revisions as being consistent with the Clean Water Act and 40 CFR Part 131, and withdrawing the Agency's January 24, 2005, action to not approve subparagraph (4)(c)1. of Rule 62-302.540 F.A.C..


This completes USEPA's review of Rule 62-302.540 F.A.C. The 10 ppb numeric total phosphorus criterion applied to the entire Everglades Protection Area using the four-part test provides the level of protection necessary to protect the designated use of these

waters and a benchmark for restoration of the Everglades. We understand the State is the process of developing the network of monitoring stations that will be used to measure ambient water levels in the Everglades Protection Area and look forward to the results of that endeavor.

The action USEPA is taking on the Rule is consistent with our consultation obligations under the Endangered Species Act. USEPA has initiated section 7 consultation under the Endangered Species Act with the U.S. Fish and Wildlife Service (the Service) on USEPA's review of the State's May 5, 2005 revisions to Rule 62-302.540 F.A.C. On April 5, 2005, the Service concurred with USEPA's conclusion that approval of the Rule, as submitted to USEPA on January 12, 2005, was not likely to adversely affect listed species or their critical habitat. USEPA has determined that the revisions that are being approved today do not change the results of the previous consultation on the Rule. USEPA has requested that the Service concur with that determination, and we will notify FDEP of the results of the section 7 consultation upon its completion.

Thank you for your continued efforts in protecting the waters of the Everglades Protection Area. If you have questions concerning USEPA's review of the May 5, 2005 revisions to Rule 62-302.540 F.A.C., please contact me at (404) 562-9345.

Sincerely,


James D. Giattina, Director
Water Management Division

cc: Gregory M. Munson, FDEP